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Illinois Commerce Commission
RAIL SAFETY SECTION

United Transportation Union –
Illinois Legislative Board (“UTU”),

Case No. T04-0082

Petitioner,

v.

Canadian Pacific Railway (“CP Rail”),

Respondent

**RESPONDENT’S OBJECTION
TO PETITIONER’S MOTION TO
AMEND COMPLAINT**

**RESPONDENT’S
MOTION TO DISMISS
AMENDED COMPLAINT AS
PREEMPTED AND MOOT**

INTRODUCTION

Respondent Canadian Pacific Railway (“CP Rail”) respectfully objects to Petitioner’s last minute Motion to Amend its Complaint based upon an entirely different dispute than that scheduled for evidentiary hearing on February 16, 2006, and moves to dismiss the Petitioner’s Amended Complaint for lack of jurisdiction and as moot pursuant to 83 Ill. Adm. Code 200.190(a). CP Rail renews its Motion to Dismiss Count One of Petitioner’s Amended Complaint which duplicates Petitioner’s Original Complaint, and moves anew to Dismiss Count Two of Petitioner’s Amended Complaint.

Count Two illustrates even more graphically than the original Complaint that this case is essentially a labor dispute, concerning where in the Bensenville Yard certain crews are to report for duty, and where in the Yard permanent restroom and lunch facilities should be built, and not about whether existing facilities comply with the Illinois Administrative Code’s provisions. This issue is clearly governed by the existing

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collective bargaining agreement between the parties and any disputes are subject to mandatory arbitration governed by the provisions of the Railway Labor Act. Therefore, the Illinois Commerce Commission ("Commission") lacks subject matter jurisdiction to address the claims asserted in the Amended Complaint since the dispute is preempted by the Railway Labor Act. For reasons set forth below, the dispute alleged in Count Two is also preempted by the jurisdiction of the Surface Transportation Board pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10501 et seq.

Count Two of the Amended Complaint deals with an entirely different area of the Bensenville Yard and an entirely different location, facility and set of facts than the Original Complaint. Given that the Amended Complaint was served upon Respondent less than one week prior to an evidentiary hearing before the Administrative Law Judge which has been scheduled for several months, Respondent has had virtually no opportunity to defend against the allegation contained in Count Two. Count Two was clearly added to harass Respondent, take unfair advantage and delay these proceedings. Petitioner's Motion for leave to Amend its Complaint to add wholly new allegations should therefore be denied. At the very least, the hearing set for February 16, 2006 should be stricken.

Accordingly, for all the foregoing reasons, CP Rail moves to dismiss Petitioner's Amended Complaint in its entirety.

BACKGROUND

In 2004, the UTU filed a Formal Complaint with the Commission alleging that CP Rail failed to provide an adequate and convenient shelter facility in the West Yard of its

Bensenville, Illinois rail-switching yard. See Formal Complaint, at 1. Specifically, the UTU alleges that CP Rail's removal of a building seven years ago and CP Rail's removal of a trailer in August 2004 deprived engineers and switchmen who work in the West Yard of a shelter facility, including restrooms and break areas. Complaint ¶¶ 3,8. The UTU claims that these actions violate several ICC regulations which relate to the provision, construction and maintenance of shelter facilities for rail carrier employees, namely: 1) 1545.110 and 1545.120 of the Illinois Administrative Code, which relate to a railroad's provision and regulation of toilet and washing facilities; 2) 1545.200 which relates to the provision of a shelter where "it is requested by an employee" who "works regularly at a location (other than a repair track) where shelter is not otherwise available," and shelter is "deemed necessary by the Commission"; and 3) 1545.210 which relates to the provision and regulation of lunch rooms.

For relief, the UTU seeks an order requiring CP Rail to build a facility for West Yard employees, apparently with permanent toilets, piped sewage system and running water, and that "plans for said shelter facility" be reviewed and approved by the Commission prior to the "construction" of such shelter facility. Id. In October of 2004, CP provided a heated, air conditioned shelter facility in the West Yard, and provides locomotive toilet facilities in the West Yard pursuant to the Federal Railway Administration's regulations and guidelines. The use of the locomotive toilet facilities in the West Yard was approved by the Commission in September of 2004.

CP Rail filed a Motion to Dismiss for lack of subject matter jurisdiction in January 2005, which was denied by the Administrative Law Judge without opinion in January, 2006. On February 10, 2006, the UTU amended its Complaint adding a second count

complaining about an entirely different area of the Bensenville Yard, the East End. Despite the fact that a brand new building with permanent toilets, sewage system, running water and a lunch room was recently constructed and opened in the East End of the Bensenville Yard, the Union now seeks another order from the Commission forcing CP Rail to build still more buildings, with permanent toilets, sewage systems and running water, in other locations at the Bensenville Yard. For the reasons set forth in Respondent's original Motion to Dismiss and below, the UTU's Amended Complaint should be dismissed.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE CLAIMS ASSERTED BY THE UTU CONSTITUTE A MINOR DISPUTE AND THEREFORE ARE PREEMPTED BY THE RAILWAY LABOR ACT

The Complaint should be dismissed because such claims constitute "minor disputes" and therefore are subject to the exclusive jurisdiction of the Railway Labor Act ("RLA"). "[T]he RLA provides a comprehensive framework for resolving labor disputes, including a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two classes of disputes—major and minor disputes." Monroe v. Missouri Pacific R.R. Co., 115 F.3d 514, 516 (7th Cir. 1997). "Major disputes relate to the formation of collective bargaining agreements or efforts to secure them." Brown v. Illinois Cent. R.R. Co., 254 F.3d 654, 658 (7th Cir. 2001), cert. denied 534 U.S. 1041 (2001). "Minor disputes" arise "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." Id. (quoting 45 U.S.C. § 151a; Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, at 252-54 (1994)).

"A plaintiff's claim is properly characterized as a minor dispute (and is therefore subject to mandatory and exclusive arbitration under the RLA) when the resolution of the plaintiff's claim requires interpretation of the CBA." Brown, 254 F.3d at 658. Additionally, "[a] plaintiff's claims are minor disputes if they depend not only on a right found in the CBA, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working relationship." Monroe, 115 F.3d at 518 (quoting Fry v. Airline Pilots Ass'n, Int'l, 88 F.3d 831, 836 (10th Cir. 1996)).

Under the RLA's "comprehensive framework," the UTU's state law claims are "minor disputes" because they implicate contractual rights and "practices, procedures, implied authority, or codes of conduct that are part of the working relationship." Monroe, 115 F.3d at 518. The collective bargaining agreement between the UTU and CP Rail, which governs the working relationship of UTU members, contains express provisions relating to CP Rail's provision and maintenance of the types of facilities at issue here. See UTU Agreement at Exhibit A.

Article 40 of the UTU Agreement provides that "[e]mployees will be furnished locker and washrooms with proper sanitary facilities at terminals reasonably convenient to the port where they go on and off duty. The same will be kept in a sanitary condition." Id. The Agreement further provides for a complaint and resolution process in the event of a dispute relating to such facilities:

In the event that some problem with respect to locker rooms, washrooms or toilet facilities is brought to the Company's attention, and is not adequately addressed by the local Company Officer, joint inspection will be arranged between the Manager of Road or Yard Operations responsible for that location and the Local Chairman upon request to determine if corrections in complained-of conditions are necessary.

Id., Art. 40(f). Accordingly, the UTU's claims arise from the interpretation and application of the UTU Agreement and the RLA preempts such claims as a minor dispute subject to the exclusive arbitral mechanism of that Act. Courts have dismissed state law claims as preempted by the RLA where, as here, such claims arise out of employees' working conditions and implicate the terms of that employee's collective bargaining agreement. See Calvert v. Trans World Airlines, 959 F.2d 698, 699-700 (8th Cir. 1992) (affirming district court's dismissal of state law claims on RLA preemption grounds because plaintiff's claims related to his working conditions and thus implicated the terms of the governing collective bargaining agreement); Leu v. Norfolk & Western R.R. Co., 820 F.2d 825, 828-29 (7th Cir. 1987) (state law claims preempted by RLA); Brown, 254 F.3d at 658.¹

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE ICCTA PREEMPTS THE COMMISSION'S JURISDICTION REGARDING LOCATION OF RAIL FACILITIES

The remedies with respect to regulation of rail transportation provided under ICCTA are "*exclusive and preempt the remedies provided under Federal or State law.*" 49 U.S.C. § 10501(b) (emphasis added). ICCTA Section 10501(b) likewise grants to the STB **exclusive** jurisdiction over--

(1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchanges and other operating rules), practices, routes, services *and facilities of such carriers*; and

¹ The Federal Rail Safety Act may also divest the Commission of subject matter jurisdiction. In its Complaint, the UTU alleges that CP Rail's removal of the trailer in the West Yard deprives employees working in that area of a restroom and lunch room/break room "for their *safety*, comfort and convenience." Complaint ¶8. Under the Federal Rail Safety Rail Act, federal law preempts state laws and regulations related to railroad safety, except in certain limited circumstances. 49 U.S.C. § 20106.

(2) the *construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities*, even if the tracks are located, or intended to be located, entirely in one State,

49 U.S.C. § 10501 (emphasis added). Finally, the term “transportation” is broadly defined to include:

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).²

Here, the Commission lacks jurisdiction over the Complaint because the issue of where facilities must be built in a rail yard are preempted by the exclusive jurisdiction clause under ICCTA. First, the allegations of the Complaint are about the existence, (or alleged lack thereof) of *facilities* in the Bensenville rail yard. ICCTA vests ***exclusive jurisdiction*** in the STB over matters relating to “transportation by rail carriers,” and “*facilities of such carriers.*” Transportation is broadly defined to include a yard, property,

² Courts interpret ICCTA’s preemption clause broadly. Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1294-96 (D. Mont. 1997) (ICCTA’s preemption provisions show an intent to occupy the entire field of regulation). State statutes and state administrative regulations that attempt to regulate railroad operations are repeatedly recognized to be preempted by ICCTA. See Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 444 (5th Cir. 2001) (state anti-blocking statute is preempted by ICCTA); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (ICCTA preempts state and local environmental review laws as applied to reopening of rail line); Burlington Northern R.R. Co. v. Page Grain Co., 545 N.W.2d 749, 750 (Neb. 1996) (holding that court lacks jurisdiction to review a Commission’s grant of a railroad’s application to discontinue a particular service agency because ICCTA “preempts state remedies and vests exclusive jurisdiction in the federal government for interstate rail matters affecting practices, routes, services and facilities of rail carriers”); Wisconsin Central v. City of Marshfield, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (ICCTA preempts defendant’s efforts under Wisconsin law to condemn property used in rail transportation). Indeed, as one court has stated, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than Congress provided in 49 U.S.C. § 10501(b)). CSX Transp., Inc. v. Georgia Public Serv. Comm’n, 994 F. Supp. 1573, 1581 (N.D. Ga. 1996).

facility, or equipment of any kind related to the movement of property, . . . and services related to that movement.”

Moreover, the STB has ***exclusive jurisdiction*** over the “construction, operation, abandonment or discontinuance of [a rail carrier’s] . . . facilities.” 49 U.S.C. § 10501(b)(2). The factual allegations contained in the UTU’s Complaint and the ICC regulations upon which it relies fall squarely within this clause. The core of the UTU’s Complaint stems from CP Rail’s removal of a trailer from the West Yard in August 2004. This claim expressly relates to the “abandonment or discontinuance” of a CP Rail “facility” and falls within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b)(2). As a remedy, the UTU seeks an order from the Commission that would require CP Rail to “construct” another shelter facility. See Complaint. Likewise, ICCTA’s exclusive jurisdiction clause preempts claims relating to the “construction” of a rail carrier’s facilities. See 49 U.S.C. § 10501(b) (conferring exclusive jurisdiction in the STB over the “construction” of a rail carrier’s “facilities”). The issues presented by the UTU’s Complaint fall solely and completely under the exclusive jurisdiction of the STB because the ICC regulations are preempted by the broad and unambiguous language of ICCTA. The Complaint should be dismissed for lack of jurisdiction.

III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE CLAIMS ARE MOOT

The Amended Complaint should also be dismissed as moot. In its Amended Complaint, the UTU alleges that CP Rail has failed to provide adequate toilet, washing or shelter facilities. The allegations in the Complaint relate back to informal complaints and inspections that occurred in the spring and summer of 2004. Since that time, CP Rail has made a number of changes relating to the alleged facilities deficiencies,

including 1) ensuring that locomotives used in the West Yard have properly functioning toilet facilities, water and crew packs, and 2) installing a heated, air conditioned bungalow shelter on the West Yard to provide additional shelter (in addition to the engine compartments in which the crews work) and house additional water and crew packs for employees who work in that area. See Affidavit of Deborah Balthazar, ¶ 2 attached to original Motion to Dismiss.

In addition, as admitted in UTU's Complaint, CP has constructed a new lunch room facility including permanent restroom facilities complying with all state regulations on the East End of Bensenville Yard. The UTU's Amended Complaint does not claim that the East End facility does not comply with Illinois regulations, only that there are times when trains block passage to the facility. Logic would dictate that unless a permanent restroom facility is build between each track in a rail yard, there will always be times when a train temporarily blocks access to any facility for some workers. Fortunately for the UTU members, by virtue of their positions on trains they are stationed in locomotives with toilet facilities, and have ready transportation to move to a different facility if one happens to be blocked and the need to reach a permanent facility is emergent. Accordingly, any concerns raised by the Complaint are moot.

CONCLUSION

For all the foregoing reasons, CP Railway respectfully requests that the Commission deny Petitioner's Motion to Amend its Complaint and grant Respondent's Motion to Dismiss the Amended Complaint in its entirety. In the event of denial of this motion Respondent requests that the evidentiary hearing scheduled for February 16, 2006 be stricken.

Dated: Feb 13 2006

DALEY & MOHAN, P.C.

By: 

Daniel J. Mohan, # 35753
150 North Wacker Drive
Suite 1550
Chicago, IL 60606

LEONARD, STREET AND DEINARD
Professional Association

Daniel L. Palmquist, #217694
Tracey Holmes Donesky, #302727
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402
612-335-1500

**ATTORNEYS FOR CANADIAN
PACIFIC RAILWAY**